IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 1, 2007 Session

CHARLEY NICOLE BIRDWELL v. STACY LEE HARRIS

Appeal from the Juvenile Court for Robertson County
No. D-20700 Ray Grimes, Judge

No. M2006-01919-COA-R3-JV - Filed December 20, 2007

The father of a five year old girl filed a petition to have primary custody of the child transferred from the mother to him. After a hearing, the trial court declined to change the custody of the child, finding that the father had failed to show a material change of circumstances, as is required by Tenn. Code Ann. § 36-6-101(a)(2)(B) before such a transfer of custody may be ordered. We affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

James C. McBroom and Jennifer Sheppard, Nashville, Tennessee, for the appellant, Stacy Lee Harris.

Mattie Lee Bhela, Springfield, Tennessee, for the appellee, Charley Nicole Birdwell.

OPINION

I. AN INITIAL CUSTODY AND VISITATION DETERMINATION

The child at the center of this case, J.A.B., was born out of wedlock on August 1, 2000. Her parents never married. The mother, Charley Nicole Birdwell, filed a petition to establish paternity and child support in the Juvenile Court of Robertson County on October 12, 2000. The father, Stacy Lee Harris, filed an answer in which he admitted paternity and stated that he had already taken steps to have the child added to his health insurance and that he was sequestering 21% of his income in a separate trust account for the child's benefit. He asked the court to grant him reasonable and liberal visitation as well as "joint residential sharing" and equal rights in any decisions concerning the child.

A hearing was conducted on February 15, 2001, following which the juvenile court entered an order setting temporary support and visitation. The final hearing of the matter was conducted on May 4, 2001. At the conclusion of the hearing, the court entered an order finding that Mother was "a fit and proper person to have the primary custody of the minor child" and awarded primary custody (or what is referred to as primary residential placement in current parenting plan terminology) to Mother. The court also declared that the child would keep Mother's surname. In the order, the court set a standard visitation schedule for the father, which the court characterized as reserving "residential sharing" to Father, including alternating weekends, alternating holidays, two weeks of summer visitation, and a week of visitation at Christmas,.

Father was ordered to pay child support of $123 per week directly to Mother, as well as child support arrearages dating from the child's birth and the medical expenses associated with that birth. The court also declared that Father was entitled to all the benefits of the non-custodial parent's bill of rights, which are set out in Tenn. Code Ann. § 36-6-101(a), and which include "unimpeded telephone conversations with the child at least twice a week at reasonable times and for a reasonable duration."[1]

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[1]The court set out the rights the father was entitled to under Tenn. Code Ann. § 36-6-101(a) as follows:

(1) To unimpeded telephone conversations with the child at least twice a week at reasonable times and for reasonable durations;

(2) To send mail to the child that the other parent shall not open or censor;

(3) To receive notice and relevant information as soon as practicable (but within 24 hours) in the event of hospitalization, major illness or death of the child;

(4) To receive directly from the school, upon written request, which includes a current mailing address and upon payment of reasonable costs of duplicating, copies of the child's report cards, attendance records, names of teachers, class schedules, standardized test scores, and any other records customarily made available to parents.

(5) Unless otherwise provided by law, the right to receive copies of the child's medical, health or other treatment records directly from the physician or health care provider who provided such treatment or health care upon written request that contains a current mailing address and upon payment of reasonable costs of duplication; provided, that no person who receives the mailing address of a parent as a result of this requirement shall provide such address to the other parent or a third person;

(6) To be free of unwarranted derogatory remarks made about such parent or such parent's family by the other parent to or in the presence of the child;

(7) To be given at least forty-eight (48) hours notice, whenever possible, of all extra-curricular activities, and the opportunity to participate or observe, including, but not limited to, the following:

(i) School activities;

(ii) Athletic activities;

(iii) Church activities; and

(iv) Other activities as to which parental participation or observation would be appropriate;

(8) To receive from the other parent, in the event the other parent leaves the state with the minor child or children for more than two (2) days, an itinerary including telephone numbers for use in the event of an emergency;

(9) Access and participation in education, including the right of access to the minor child or children for lunch and other activities, on the same basis that is provided to all parents, provided the participation or access is reasonable and does not interfere with day-to-day operations or with the child's educational performance.

The proof showed that Father paid his child support faithfully in the years that followed. Unfortunately, the parents often found themselves in conflict about non-financial matters during that time. Father alleges that Mother short-changed his visitation with J.A.B. and unnecessarily limited or inhibited his telephone contact with her. Mother claims that she did not interfere with Father's visitation, that he has threatened her in order to obtain additional visitation beyond the court's requirements, that he impeded her own phone calls, and that he confronted her in a hostile way in front on the child.

A large part of the problem appears to stem from the failure of the parents to come to agreement as to the dimensions of Father's paternal role in J.A.B's life as the parties moved on in their own lives. Father married his long-time girlfriend Kelley Binkley, and the couple became the parents of another little girl. Meanwhile, Ms. Birdwell developed a relationship with a man named Darren Smith, and they moved in together. At the time of trial Ms. Birdwell and Mr. Smith were planning to get married.

Father admitted that Mr. Smith was good to his child, that he took her fishing and to soccer practice, but he objected to the fact that Mother allows the child to call her fiancé "Daddy Darren" or "Daddy," and he testified that he had many lengthy discussions with her about that. Father found it especially unfair that Mother discouraged J.A.B. from calling his own wife "Mama Kelley." He also was offended that Mother referred to his younger daughter as J.A.B.'s "half sister" or "stepsister" instead of simply her sister. However, Father also admitted that he had on at least one occasion referred to Mother as "the donor" or "the surrogate."

II. A Petition to Modify Custody

On March 11, 2005, Father filed a petition which asked the court to grant him custody of J.A.B. and to allow him to change the child's surname to his own. He alleged that Mother's cohabitation with her boyfriend was immoral. He also asked the court to find Mother in contempt for failing to comply with the visitation schedule. His petition included a list of incidents in which Mother allegedly withheld scheduled visitation from him or delivered the child late for such visitation, and he asked the court to hold Mother strictly accountable for complying with the orders of the court.

Mother filed an answer and counter-petition. She contended that Father had not alleged any material change of circumstance sufficient to trigger analysis of a change of custody, and she denied interfering with the visitation schedule. She also denied that her boyfriend's presence in the home had a negative effect on J.A.B., and she argued that in any case Father was coming to court with unclean hands due to his prior conduct of a similar nature. Mother requested an increase in child support, a temporary restraining order, and a finding that Father was in contempt of court.

The trial of the matter was held on June 26, 2006. Since the trial court dismissed the petition at the close of Father's proof, he and his wife were the only witnesses to testify at length. Father did call Mother to testify, but she was only questioned about financial and employment matters. Father had kept a calendar of visitations, which he was allowed to refer to as he testified to eleven instances when he did not receive the visitation the court's order entitled him to, including times when Mother

had cancelled visitation because of the child's illness or for other reasons, but had refused to give Father additional visitation at a later time to make up for it. On cross-examination he admitted that on at least one occasion he himself had been late in returning J.A.B. to Mother.

It appears that Father kept very meticulous records, for his recitation included an entire week of missed visitation during Christmas 2001, several occasions where he was denied the ordered visitation for an entire day, and incidents where Mother brought J.A.B. to him five, ten, thirty or fifty minutes late, or picked the child up thirty minutes early. Father also complained that he had never been able to have two telephone conversations per week with his daughter as ordered, but usually averaged more like one such conversation per month. He testified that Mother changed her phone number frequently, that she had given him an unusable number on two occasions, and that when he did get through Mother sometimes refused to call J.A.B. to the phone. He also testified that it was his practice to record all his phone calls with Mother.

Although Father alleged other bases for modification of custody at the trial, on appeal he relies solely on Mother's non-compliance with the existing order's visitation provisions and her interference with his other rights.[2]

At the conclusion of Father's proof, Mother's attorney moved the trial court to dismiss the petition. The court announced from the bench that it was granting her motion. An order filed on August 14, 2006 memorialized its decision. In that order, the court found that there had not been "a material change in circumstance that would warrant reviewing the custody of the minor child."

The court did, however, clarify or "tweak" as the court described it, some provisions of the existing order, including more specific designation of holiday visitation, requirements for notice, and telephone communications. The order also specifically stated that "Mother is the primary residential parent." Father and Mother were ordered not to make disparaging remarks about each other. They were each declared to be entitled to one uninterrupted phone call per day with J.A.B. while the child was in the custody of the other party, but both parties were ordered to otherwise refrain from telephone contact with each other, unless there was an emergency regarding the child.[3] The court also reiterated the terms of the standard visitation schedule, but declared that in matters such as when

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[2]At trial, Father claimed that Mother's cohabitation with Mr. Smith amounted to a material change of circumstances. In his testimony, Father asserted that he believed Mother's lifestyle was immoral. He admitted, however, that he himself had fathered J.A.B. out of wedlock, that he had sexual encounters with several other women while he was dating his current wife, and that he and she had lived together without benefit of marriage for several years before they finally married. He conceded that his own conduct prior to marriage was not dissimilar to the conduct he characterized as immoral in Mother.

[3]One unusual provision of the trial court's order was a requirement that both parties record all phone calls. The court adopted that provision because in light of the father's testimony that he routinely recorded calls to J.A.B. and to the mother and planned to continue to do so, the court did not want to give him an advantage the mother did not enjoy. At oral argument, the mother's attorney stated she had no objection to the father recording phone calls, but did not plan to do so herself.

the child was dropped off at Father's house to start his visitation or when Father returned the child to Mother at the end of visitation, "[t]ime is considered to be of the essence."[4]

Apparently in view of the evidence regarding missed Christmas visitation, the court also held that Father was entitled to one additional week of summer vacation in 2006 to make up for the visitation that he was denied during Christmas of 2001. Father appealed.

III. A MATERIAL CHANGE OF CIRCUMSTANCE

Because children are more likely to thrive in a stable environment, the courts favor maintaining existing custody arrangements. *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Kellett v. Stuart*, 206 S.W.3d 8, 14 (Tenn. Ct. App. 2006); *Hoalcraft v. Smithson,* 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). A valid custody order or residential placement schedule, once entered by the court, is *res judicata* as to the facts in existence or reasonably foreseeable when the decision was made. *Keisling v. Keisling*, 196 S.W.3d 703, 719 (Tenn. Ct. App. 2005); *Hoalcraft*, 19 S.W.3d at 828.

Nonetheless, a custody and visitation order, or the residential schedule in a permanent parenting plan, may be modified in certain situations. Such an order remains within the control of the court and is subject to "such changes or modification as the exigencies of the case may require." Tenn. Code Ann § 36-6-101(a)(1). Both the legislature and the courts have addressed the requirements for a such modification, in recognition of the fact that the circumstances of children and their parents change, sometimes requiring changes in the existing parenting arrangement. When a petition to change custody is filed, the parent seeking the change has the burden of showing that a material change in circumstances has occurred which makes a change in custody in the child's best interest. *Blair v. Badenhope,* 77 S.W.3d 137, 148 (Tenn. 2002); *In re M.J.H.,* 196 S.W.3d 731, 744 (Tenn. Ct. App. 2005); *In re Bridges,* 63 S.W.3d 341, 348 (Tenn. Ct. App. 2001).

A decision on a request for modification of a parenting arrangement requires a two-step analysis. *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003). A party petitioning to change an existing custody order must prove both (1) that a material change of circumstances has occurred and (2) that a change of custody or residential schedule is in the child's best interest. *Kendrick v. Shoemake*, 90 S.W.3d 566, 575 (Tenn. 2002). Only after a threshold finding that a material change of circumstances has occurred is the court permitted to go on to make a fresh determination of the best interest of the child. *Kendrick*, 90 S.W.3d at 569; *Badenhope*, 77 S.W.3d at 150; *Curtis v. Hill,* 215 S.W.3d 836, 840 (Tenn. Ct. App. 2006).

As to the first requirement, *i.e.*, a material change of circumstances the Tennessee Supreme Court has stated:

> Although there are no bright line rules as to whether a material change in circumstances has occurred after the initial custody determination, there are several

[4]The court stated from the bench that the mother had interfered with the father's visitation. However, that finding was not explicitly expressed in its order.

> relevant considerations: (1) where a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way.

Cranston v. Combs, 106 S.W.3d at 644 (citing *Kendrick*, 90 S.W.3d at 570).

The General Assembly has also addressed the question of what constitutes a material change of circumstances:

> (B) If the issue before the court is a modification of the court's prior decree pertaining to **custody**, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.
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> (i) In each contested case, the court shall make such a finding as to the reason and the facts that constitute the basis for the custody determination.
> (ii) Nothing contained within the provisions of this subdivision (a)(2) shall interfere with the requirement that parties to an action for legal separation, annulment, absolute divorce or separate maintenance incorporate a parenting plan into the final decree or decree modifying an existing custody order.
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> (C) If the issue before the court is a modification of the court's prior decree pertaining to **a residential parenting schedule**, then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Tenn. Code Ann. § 36-6-101(a)(2)(B) and (C).

The distinction as to the applicability of (B) as opposed to (C) is not clear from the language. In other words, the language of the provisions could be interpreted as evidencing a legislative intent that (B) apply to modification of prior orders of custody and visitation and that (C) to apply to modifications of parenting plans entered after the effective date of the parenting plan legislation.

Alternatively, it is arguable that the legislature intended that subsection (B) apply to requests for a change of primary custody or of primary residential parent status and that (C) apply to requests to change smaller details of a residential parenting schedule short of a change in primary residential parent or primary custodian designation.

In any event, it appears to us that subsection (B) applies to the case before us for two reasons. First, Father asked for a modification that would give him primary custody, or make him the primary residential parent, not for additional visitation or residential time with the child. Second, the existing order that established the parenting arrangement that father wanted to modify was a custody order and not a permanent parenting plan.[5]

Only if a material change of circumstances is shown to exist is the trial court to proceed to the next step of the analysis: whether modification of the existing parenting arrangement is in the child's best interest. *Cranston*, 106 S.W.3d at 644; *Kendrick*, 90 S.W.3d at 569; *Curtis,* 215 S.W.3d at 840. That determination requires consideration of a number of factors, including those set out in Tenn. Code Ann. § 36-6-106(a) (factors to consider in custody determination) and Tenn. Code Ann. § 36-6-404(b) (factors to consider in establishing a residential schedule).

In granting the defendant's motion for dismissal at the close of the petitioner's proof, the court held that Father had failed to meet his burden of proving a material change of circumstance. Father argues on appeal that the trial court erred reaching such a holding.

This court should apply the general standard of review set out in Tenn. R. App. P. 13 (d).

> We review the trial court's conclusions of law "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." Furthermore, our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise.

Kendrick, 90 S.W.3d at 570. There is no question in this case that the trial court's used the correct legal standard applicable to requests for modification of parenting arrangements. There are no other questions of law presented. Consequently, the issue is one of fact, to which we apply the presumption of correctness.

Moreover, trial courts are generally accorded greater discretion concerning custody and visitation issues. Because of the broad discretion given trial courts in matters of child custody,

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[5]The existing order is not in the format of a parenting plan, does not address all the specifics usually addressed in such a plan, and uses nomenclature not consistent with such plans. For example, it states, "Mother is a fit and proper person to have the primary custody of the minor child named in this Petition." Even though the parenting plan legislation was in effect at the time of the original custody order, because the existing custody order was not entered as part of a "final decree . . . in an action for absolute divorce, legal separation, annulment, or separate maintenance," the requirement of a permanency plan in Tenn. Code Ann. § 36-6-404(a) does not apply.

visitation, and related issues, including change in circumstances and best interests, and because of the fact specific nature of such decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631(Tenn. Ct. App. 1996)). Accordingly, this court will decline to disturb a parenting arrangement fashioned by a trial court unless that decision is based on the application of incorrect legal principles, is unsupported by a preponderance of the evidence, or is against logic or reasoning. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

The material change of circumstances alleged by Father is Mother's failure to provide him with the visitation allowed in the original custody order. As Father points out, courts have found that a parent's attempts to interfere with the other parent's relationship with the child may constitute a material change of circumstances. Similarly, by statute, failures to adhere to an order of custody and visitation may also be found to be a material change of circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B). However, there is still the requirement that the circumstances alleged to be a material change "affect the child's well-being in a meaningful way." *Cranston*, 106 S.W.3d at 644. Similarly, the statute implies that a failure to comply with a custody order, like other changes in circumstance, must be such that the existing parenting arrangement is no longer in the best interest of the child.

In the case before us, Father presented evidence of missed or shortened visitation time. The instances he recited, including some involving mere tardiness, do not appear to rise to the level of an intentional pattern designed to interfere with Father's relationship with the child. They do not present a situation that is nearly as serious as that present in the cases cited by Father in which a material change of circumstances was found to exist. *See, e.g.*, *Cranston*, 106 S.W.3d at 641 (holding that the mother had a long history of deliberate and consistent interference with the visitation rights of the father and of interference with and monitoring of his telephone conversations with the children, and that her conduct threatened the children's ability to maintain a relationship with their father.)

Although Father makes the same sorts of allegations in the present case, his testimony indicates that Mother has been far more compliant with the court's visitation order than was Ms. Cranston. By filing a motion to dismiss at the end of the plaintiff's proof, Mother chose not to put on evidence that might refute Father's allegations that Mother unreasonably curtailed his visitation. Father's testimony as to a relatively small number of incidents where his visitation was curtailed over a period of more than four years shows that the vast majority of the time he has been able to enjoy regular visitation with his daughter.

Father asserts that the curtailment of his visitation affects J.A.B.'s well-being in a meaningful way because it makes it very difficult for him to maintain a parental relationship with her. We agree that the quality of a child's relationship with the non-custodial parent may depend on the amount of time the parent is able to spend with the child. We also agree that it is generally in a child's best interest to maintain strong relationships with both parents.

However, not every failure to precisely meet the schedule set out by the court amounts interference with the other parent's relationship with the child or to a material change of circumstance.[6] Nonetheless, Father has not offered any actual proof that the shortened or missed visitation has affected J.A.B. in a meaningful way or that his relationship with her had in fact been damaged by it. He testified that he had managed to create a positive relationship with J.A.B., an accomplishment that can be difficult for a non-custodial parent to achieve where the parents have never lived together. He also testified that J.A.B. was doing well in school, was well kept, and was of appropriate weight.

We have reviewed this record at length and conclude that the evidence does not preponderate against the trial court's conclusion that Father failed to prove such a material change of circumstances affecting the child's well-being in a material way as would compel the court to conduct a comparative fitness or best interest inquiry, or to justify the "drastic remedy" of changing custody. We therefore affirm the trial court.

IV. ISSUES RAISED BY MOTHER

Mother argues that the trial court erred in declining to alter Father's child support obligation of $123 a week. She does not challenge the method of calculation, but rather the income upon which the trial court based its calculations. She insists that the child support should have been based upon Father's 2005 income of $55,687.16, which when divided by the twelve months of the year equals $4,640.60 per month. Father is an aircraft assembly worker and is employed by Vought Aircraft Industries.

Father testified, however, that his 2005 income was higher than normal because of the unusual amount of overtime that he worked during that year and that he received very little overtime during the first six months of 2006. He also testified that he earned $20.80 per hour, and that shutdowns at his plant sometimes resulted in unpaid leave. The court later found on the basis of a current pay stub that Father had overstated his hourly income, which was actually $20.48. Multiplying such an hourly wage by forty-hour weeks over an entire year, and then dividing by twelve results in a monthly income of $3549.87.

Modification of an existing child support order is governed by Tennessee Code Annotated § 36-5-101(g)(1), which states,

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[6] All sorts of unexpected events, such as illness and traffic problems may prevent court-ordered visitation from taking place within the time allocated for it, and a flexible attitude by both parents is helpful for maintaining good relations between them and reducing the stress the child would otherwise suffer from having to go back and forth between parents. When the non-custodial parent has lost some of his visitation time because of unexpected events, the most beneficial approach would be for both parents to work together to find a way to make up for it. Father testified that Mother consistently refused to allowed him to make up lost time.

> [u]pon application of either party, the court shall decree an increase or decrease of support allowance when there is found to be a significant variance, as defined in the child support guidelines established by subsection (e), between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed.

A significant variance has been defined as at least a 15% difference in the existing support obligation and the support obligation under the guidelines based on present income. *See Turner v. Turner*, 919 S.W.2d 340, 343 (Tenn. Ct. App. 1995). The trial court found that no such variance had been proved and left the child support at the same level it had been prior to the father's petition. We can find no error in the trial court's action.

Mother also asserts that Father's appeal is "clearly frivolous" and she asks us to grant her the attorney fees she incurred on appeal. A frivolous appeal is one that is "devoid of merit." *Combustion Engineering, Inc. v. Kennedy,* 562 S.W.2d 205 (Tenn. 1978), or one in which there is little prospect that it can ever succeed. *Robinson v. Currey* 153 S.W.3d 32, 42 (Tenn. Ct. App. 2004); *Industrial Dev. Bd. of the City of Tullahoma v. Hancock,* 901 S.W.2d 382, 385 (Tenn. Ct. App.1995). Although we agree with the trial court that the evidence presented did not rise to the level of a material change of circumstance such as could lead to a change of custody, we cannot say that the appeal in this case was so utterly devoid of merit as to justify finding the appeal frivolous. We therefore decline to hold this to be a frivolous appeal or to award Mother attorney's fees.

V.

The judgment of the trial court is affirmed. We remand this case to the Juvenile Court of Robertson County for any further proceedings necessary. Tax the costs on appeal to the appellant, Stacy Lee Harris.

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PATRICIA J. COTTRELL, J.